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Property Damage Caused by Subcontractors' Defective Work is Not an "Occurrence" Under a CGL Policy

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On October 9, 2018, in *Ohio Northern University v. Charles Construction Services, Inc.*, Slip Opinion No. 2018-Ohio-4057, the Supreme Court of Ohio extended its holding in *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St.3d 476, 2012-Ohio-4712, to property damage caused by a subcontractors' faulty work. In *Custom Agri*, the Court held: "Claims of defective construction or workmanship brought by a property owner are not claims for 'property damage' caused by an 'occurrence' under a commercial general liability policy." Syllabus.

In *Charles Construction*, the appellee Ohio Northern University ("ONU") contracted the appellee Charles Construction to build The University Inn and Conference Center (the "Inn"). After the Inn was completed by Charles Construction and its subcontractors, ONU discovered that the Inn suffered extensive water damage from hidden leaks that ONU believed were caused by defective work of Charles Construction and its subcontractors. ONU sued Charles Construction and Charles Construction sought defense and indemnity under a CGL policy issued to it by Cincinnati Insurance Company ("CIC"). The policy defined "occurrence" to mean an "accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The appellees and CIC filed cross motions for summary judgment and the trial court issued judgments in favor of CIC, citing the *Custom Agri* decision. The Third District Court of Appeals reversed the trial court. The Third District noted that the *Custom Agri* decision did not address a products-completed operations hazard clause or subcontractor-specific CGL policy terms (a "Damage to Your Work" exclusion). The Third District found the CGL policy language to be ambiguous as to whether it covered claims for property damage caused by subcontractors' defective work.

Justice French in the Supreme Court of Ohio majority opinion, however, wrote: "To resolve this matter, we need only apply the holding of *Custom Agri*." She reasoned that: "Property damage caused by a subcontractors' faulty work is not an 'occurrence' under a CGL policy because it cannot be deemed fortuitous. Hence, the insurer is not required to defend the CGL policy holder against suit by the property owner or indemnify the insured against any damage caused by the insured's subcontractor." Justice French observed that the damage must be due to an "occurrence", which is defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions, and that "without an 'occurrence' as defined in the CGL policy, there is no coverage for any property damage."

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It is acknowledged that the reasoning in *Charles Construction* contrasts with recent decisions of other courts. The majority says that if the Ohio General Assembly were so inclined, it could take action similar to the Arkansas legislature after the Arkansas Supreme Court held that a CGL insurer did not have a duty to defend a homebuilder sued for his subcontractors' faulty workmanship. The Arkansas legislature enacted a requirement that a CGL policy offered for sale in Arkansas shall define "occurrence" to include "[p]roperty damage * * * resulting from faulty workmanship."

Chief Justice O'Connor and Justice Kennedy concurred in judgment only.

We note that not all CGL policies define "occurrence" as the CGL policies in *Custom Agri* and *Charles Construction*. Some contain an amendment to the definition of "occurrence" stating it includes "'property damage' to 'your work' if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor and the 'property damage' to 'your work' is included in the 'products-completed operations hazard'[.]"

The full opinion can be found at
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-Ohio-4057.pdf.

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